

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

77-6022

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,

Plaintiff-Appellee,

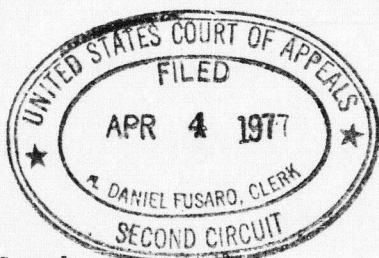
Plaintiff-Relator-Appellant,

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP.,

Defendants-Appellees.

BRIEF OF APPELLANT DOROTHY S. GREENBERG



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INDEX

	PAGE
Preliminary Statement	2
Issues Presented	7
The Statute Involved	8
Statement of Case	9
The Complaint	9
The Information Furnished the Government on September 30, 1976, by Relator and the Govern- ment's Contentions With Respect Thereto	17
MarAd	18
Congressman Les Aspin	20
The Department of Justice	22
The Securities and Exchange Commission	23
The House Committee on Government Operations [The "Brooks Committee"]	24
The General Accounting Office	25
The New York Times Article of August 19, 1976 ..	25
What the Government Did Not Know	27

ARGUMENT

POINT I—

The Court's Finding That the Kurrus Memorandum "Was Fully Described" in The New York Times August 19th Article and Hence Was "Public Knowledge" Was Clearly Erroneous	28
---	----

POINT II—

The District Court's Finding That the Government Would "Inevitably" Have Obtained the Katus Memorandum Was an Unwarranted Assumption Not Supported by the Record and Erroneously Narrowed the Jurisdictional Scope of the Statute	33
---	----

POINT III—

Relator Has Performed a Public Service in Bringing to Light Evidence of an Alleged Fraud and Alleged Complicity of a Government Agency, Having Assembled and Submitted to the Government New Substantive Information and Evidence Not Theretofore in Its Possession. The False Claims Act Was Enacted to Grant Jurisdiction to Private Citizens to Sue Under Precisely These Circumstances	35
The Legislative History of the False Claims Act	37
The Senate Debates on H.R. 1203	42
The District Court's Failure to Recognize That This Is Not a "Parasitic" Action	46

POINT IV—

The District Court Correctly Determined That Because of MarAd's Alleged Complicity, Information in the Possession of MadAd Could Not Be Imputed to the Government for Purposes of Defeating Jurisdiction Under the False Claims Act. In Any Event MarAd Did Not Have All the Information and Documents	48
--	----

POINT V—

The Justice Department Did Not Act Timely or With Diligence. There Is No Authority for Its Special Appearance on the Sixty-third Day After the Filing of the Action. Maintenance of This Action Should Be Permitted	50
---	----

	PAGE
POINT VI—	
The Damages to the United States and Its Tax- payers Are Already Substantial. If Jurisdiction Is Sustained, the Documentary Evidence Will Establish That Defendants Kulukundis, Chen and Burmah, Aided and Abetted by the Other Defen- dants, Engaged in a Subterfuge to Defraud the Government and to Cause False Applications for Financing to Be Filed With MarAd	51
CONCLUSION	63
ADDENDUM—	
The False Claims Act, 31 U.S.C. §§ 231, et seq.	SA1
Revised Statutes, Sections 3490 and 5438	SA5

TABLE OF AUTHORITIES

Cases:

<i>Abrahamson v. Fleschner</i> , 1977 [Current] CCH Fed. Sec. L. Rep. ¶95,889 (2d Cir. 1977)	37
<i>Bateson-Stolte, Inc. v. The United States</i> , 305 F.2d 386, 158 Ct. of Claims 455 (Ct. of Claims 1962)	35, 48, 50
<i>Branzburg v. Hayes</i> 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 626 (1972)	35
<i>Carr v. Learner</i> , 547 F.2d 135 (2d Cir. 1976)	9
<i>Continental Bank & Trust Co. of Salt Lake City v.</i> <i>Garfinkle</i> , 292 F. Supp. 709 (S.D.N.Y. 1968)	50
<i>Dillon v. Berg</i> , 326 F. Supp. 1214 (D. Del. 1971) <i>aff'd</i> , 453 F.2d 876 (3d Cir. 1971)	49

<i>Grace v. Ludwig</i> , 484 F.2d 1262 (2d Cir. 1973) <i>cert. denied</i> , 416 U.S. 905 (1974)	36
<i>Grammenos v. Lemos</i> , 457 F.2d 1067 (2d Cir. 1972)	51
<i>Henry v. United States</i> , 250 F. Supp. 526 (N.D. Miss. 1965)	50
<i>J. I. Case Co. v. Borak</i> , 377 U.S. 426, 845 S. Ct. 1555, 12 L. Ed. 2d 423 (1964)	36, 37
<i>Laub v. Genway Corporation</i> , 60 F.R.D. 462 (S.D.N.Y. 1973)	50
<i>Meachem Corp. v. United States</i> , 207 F.2d 535 (4th Cir. 1953), <i>cert. gr.</i> , 347 U.S. 932, <i>cert. dismiss.</i> , 348 U.S. 801 (1953)	9
<i>Rainwater v. United States</i> , 356 U.S. 590, 78 S. Ct. 946, 2 L. Ed. 2d 996 (1958)	8, 38, 39, 40
* <i>Schoenbaum v. Firstbrook</i> , 405 F.2d 200 (2d Cir. 1968), <i>cert. denied</i> , 395 U.S. 906 (1969)	49
<i>S.E.C. v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180, 84 S. Ct. 275, 11 L. Ed. 2d 337 (1963)	37
<i>Southern Farm Bureau Casualty Insurance Co. v. Allen</i> , 388 F.2d 126 (5th Cir. 1967)	49
<i>United States v. Bornstein</i> , 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976)	8, 36, 37, 50
<i>United States v. McNinch</i> , 356 U.S. 595, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958)	38, 39
<i>United States v. Neifert-White Co.</i> , 390 U.S. 228, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968)	36
<i>United States v. Rippetoe</i> , 178 F.2d 735 (4th Cir. 1949)	32, 49
<i>United States v. Silver</i> , 384 F. Supp. 617 (E.D.N.Y. 1974), <i>aff'd</i> 515 F. 2d 505 (2d Cir. 1975)	38

	PAGE
<i>United States ex rel. Marcus v. Hess</i> , 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943) reversing 127 F. 2d 233 (3d Cir. 1942)	36-37, 38, 40, 41
<i>United States ex rel. Martin-Trigona v. Ford</i> , Civ. Action # 76-1374 (D.C. Dist. of Col. Oct. 28, 1976).....	47
<i>United States ex rel. Sherr v. Anaconda Wire & Cable Co.</i> , 57 F. Supp. 106 (S.D.N.Y. 1944), <i>aff'd</i> , 149 F.2d 680 (2d Cir. 1945)	47
<i>United States ex rel. Thompson v. Hays</i> , Civ. Actions ## 76-1078, 76-1132, 76-1140 (D.C. Dist. of Col. Oct. 30, 1976)	47
<i>United States ex rel. Vance v. Westinghouse Electric Corp.</i> , 363 F. Supp. 1038 (W.D. Pa. 1973).....	32, 33, 34, 46, 47

STATUTES

The False Claims Act,
31 U.S.C. §§231, et seq.:

Section 231, 31 U.S.C. §231	2, 8
Section 232(B), 31 U.S.C. §232(B)	39, 43
Section 232(C), 31 U.S.C. §232(C)	35, 36, 50, 51
Section 232(E1), 31 U.S.C. §232(E)(1)	39, 43
232(E2), 31 U.S.C. §232(E)(2)	39, 43
Revised Statutes §§3490-3494, 5438 (1878).....	8, 42, 43
Act of March 2, 1863, Ch. 67, 12 Stat. 696	8, 37
40 Stat. 1015 (1918)	40
40 Stat. 1291 (1936)	40

The Merchant Marine Act

<i>of 1936</i> , 46 U.S.C. §1101 et seq.:	2, 12
Title V, §§1151, et seq.	9, 12
Title XI, §§1271, et seq.	9, 12

	PAGE
<i>The United States Shipping Act of 1916,</i> 46 U.S.C. 801, et seq.:	9
Section 802, 46 U.S.C. §802	12

OTHER AUTHORITIES

<i>Congressional Globe</i> , 37th Congress 3rd Sess. (1863).....	38, 39
89 <i>Cong. Record</i> 7571 et seq. (1943)	40-46 <i>passim</i>
89 <i>Cong. Record</i> 10844 et seq. (1943)	41, 46

Editorials:

Janeway, "Lame Duck Legacy Left by Richardson," <i>The Washington Star</i> , Jan. 30, 1977	11
"Of Ships and Contracts", <i>The New York Times</i> , p. 20, January 31, 1977	11

Note: "Qui Tam Suits Under the Federal False Claims Act; Tool of the Private Litigant in Public Actions", 67 <i>Northwestern U. Law Rev.</i> 446 (1972).....	37, 38, 39, 40
--	----------------

Note: "Qui Tam Actions: The Role of the Private Citi- zen in Enforcement", 20 <i>U.C.L.A. Law Rev.</i> 778 (1973)	37, 38
---	--------

Proxmire, "The Outrageous General Dynamics Loan Guarantee", <i>The Cong. Record</i> , S.2207-08, Feb. 3, 1977	11
---	----

S. Rep. No. 291, on H.R. 1203, entitled "A Bill to Eliminate Private Suits for Penalties and Damages Arising Out of Frauds Against the United States," 78th Cong., 1st Sess. (1943)	41, 42, 43
--	------------

5 Wright and Miller, <i>Federal Practice and Procedure</i> , Civil §1344 (1969)	51
--	----

5 Wright and Miller, <i>Federal Practice and Procedure</i> , Civil §1350, pp. 551-553 (1969)	9
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Defendants-Appellees.

BRIEF OF APPELLANT DOROTHY S. GREENBERG

Preliminary Statement

Plaintiff-Relator, Dorothy S. Greenberg ("Relator"), appeals from an Order and Final Judgment, dated January 6, 1977, entered January 10, 1977, in accordance with the unreported Memorandum dated December 22, 1976 of Judge Whitman Knapp, dismissing on jurisdictional grounds this *qui tam* action, brought under the False Claims Act, 31 U.S.C. §§231 *et seq.* (A575-582).*

Relator filed this action pursuant to the False Claims Act [31 U.S.C. §232(C)] on September 30, 1976, on behalf of and in the name of the United States of America (the "Government") (A1), alleging that "all the documents and information contained therein" as listed on Schedule A to the Complaint were "not in the possession of the United States, the Attorney General thereof or any of its agencies or instrumentalities." (A5). She seeks to recover damages and penalties for the Government, on the grounds that it was fraudulently induced to pay out "in excess of \$60 million" in ship construction subsidies, granted by an agency of the Government, upon false applications made in purported compliance with Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§1101 *et seq.*). (A25-26).

The Court's basis for the dismissal was its interpretation of Section 232(C) of the False Claims Act [31 U.S.C. §232(C)] and its conclusion that Relator's action was "based upon evidence or information in the possession of the United States, or an[y] agency, officer or employee thereof, at the time such suit was brought." *Ibid.* (A575-579).

In accordance with the False Claims Act, on September 30, 1976, Relator cause the verified complaint to be served on the United States Attorney for the Southern District of New York and a copy of the complaint accompanied by ten documents (or sets thereof), amassed by the Relator and listed on Schedule A to the complaint, to be

* The letter "A" refers to pages in the Joint Appendix.

transmitted, certified mail, to the Attorney General of the United States in Washington, D.C. (A497; 504).*

On December 2, 1976, the sixty-third day after the action was filed, the Government, by motion papers dated December 1, 1976 and entitled "Notice of Special Appearance and Motion to Dismiss", moved, purportedly pursuant to Section 232(C) of the False Claims Act [31 U.S.C. §232 (C)] to dismiss for lack of jurisdiction, claiming that Relator's action "was based upon evidence or information in the possession of the United States . . . at the time . . . suit was brought.** (A263; 503-504).

In its Memorandum Opinion of December 22, 1976, the District Court found that all *but one* of the ten documents submitted by Relator to the Government, were prior to September 30, 1976, in possession of the Government—either the Maritime Administration, the House of Representatives' Committee on Government Operations, or the Department of Justice.*** In making its determination, the

* This procedure is mandated by Section 232(C) of the False Claims Act, 31 U.S.C. §232(C). Schedule A to the Complaint is entitled:

"STATEMENT OF DISCLOSURE ON BEHALF OF DOROTHY S GREENBERG PURSUANT TO SECTION 232(C) OF TITLE 31 OF THE UNITED STATES CODE", (A28);

and lists ten documents or sets thereof. These documents are sometimes herein referred to collectively as the "ten documents." They are reproduced at pages A30 to A262 of the Joint Appendix.

** Thirty-three of the thirty-five named defendants, all appearing by counsel, also moved to dismiss without supporting papers by a single Notice of Motion, dated December 6, 1976, relying on the Government's papers. (A2). The defendants had not answered, their time to move or answer having been extended to December 6, 1976 informally by correspondence.

The False Claims Act contains no express provision authorizing a special appearance. Nor do the Federal Rules of Civil Procedure. See discussion at Point V *infra*.

*** The Maritime Administration, sometimes herein and in the Record, referred to as MarAd, is an agency in the Department of

District Court adopted one position of Relator urged below, to the effect that because of the alleged complicity of MarAd, knowledge and information in MarAd's possession may not be imputed to the Government. (A577). Nonetheless, the Court found that all of the substantive evidence or information presented by Relator was in possession of other agencies of the Government, including a Congressional Committee, prior to the filing of this suit and the Court therefore dismissed for lack of jurisdiction. (A575-579).

A highly material document, conceded below to not be in the physical possession of the Government at the time of suit, was the full text of a three-page single-spaced internal confidential memorandum, dated May 12, 1975, from Richard W. Kurrus, attorney for the defendant, The Burmah Oil Company Limited, ("Burmah") to its then Chief Executive Officer, Dr. John J. McMullen. (A276; 492-495, 501-502). That document (referred to herein as the "Kurrus Memorandum") purports to memorialize the events occurring at two meetings between representatives of Burmah and MarAd, on May 8, 1975, in which Burmah's attorney Mr. Kurrus participated. One of the representatives present for MarAd was Robert J. Blackwell, "Maritime Administrator, Assistant Secretary of Commerce for Maritime Affairs." (A47-49).*

Commerce. It has the responsibility for passing upon applications for ship construction subsidies and loan guarantees under Titles V and XI of the Merchant Marine Act of 1936, *supra*. (A264-266).

* The Court found that:

"The Maritime Administration had all of the information except for the Kurrus Memorandum. The Administration had obtained certain information relating to possible self-dealing by Elias J. Kulukundis from a complaint filed in New York State Supreme Court rather than from the documents subsequently supplied by the relator. The House Committee on Government Operations had substantially the same information as the Maritime Administration. The Committee did not,

With regard to the Kurrus Memorandum, Judge Knapp found as follows:

"The one new document which the relator claims to have brought to the Government's attention is a memorandum by a lawyer named Richard Kurrus from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it. The relator argues that this memorandum in itself constitutes substantial information and also that it warrants our concluding that the Maritime Administration was sufficiently involved in the scandal so that we should disregard any documents or information it possessed in making our determination. (A576).

"As for the claim that the Kurrus Memorandum constitutes substantial information, we so assume for present purposes. We note, however, that it was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge. A copy of the article was in the files of the Justice Department. The information was therefore in the Department's possession and the memorandum itself would inevitably have been acquired by the Department in the course of its

however, have the folder of newspaper clippings compiled by the relator.

The Securities and Exchange Commission had none of the material information. The Department of Justice had only the *New York Times* articles and Congressman Aspin's remarks in the *Congressional Record*." (A579).

Defendant Elias J. Kulukundis ("Kulukundis") was the former Chief Executive Officer of Defendant Burmah Oil Company Limited and certain of its subsidiaries which are also named as defendant-appellees. He was the immediate predecessor of John J. McMullen, the original recipient of the Kurrus Memorandum. (A9, 47).

investigation had it been considered important." (A577).*

As shown under Point I, *infra*, the Kurrus Memorandum was not "fully described" in the *New York Times* article. Further, it must be conceded that as of September 30, 1976 (i) there had been no public legal proceeding or action instituted by the United States, or any agency thereof, arising out of the alleged facts contained in Relator's complaint; (ii) there had been no indictments or grand jury proceedings; and (iii) there had been no Congressional hearings, in public or private session, or Congressional investigation, other than preliminary Congressional inquiries. (A221-223).

The Government contended in oral argument on December 10, 1976, the return day of the motion, and subsequently in a post-argument reply affidavit, that the Department of Justice was then currently conducting an

* In its brief below, the Government argued and conceded that: "There are . . . only 4 documents submitted by the Relator that the United States did not have in its possession prior to the commencement of this action. . . . The first of these, item 2 on Schedule A, is a three-page memorandum dated May 12, 1975, from Richard Kurrus to John J. McMullen . . . (the 'Kurrus Memorandum').

* * * * *

The remaining three documents, items 7, 8(a) and 8(b), are a memorandum of law concerning alleged self-dealing of Elias Kulukundis and memoranda of conversations with Elias Kulukundis and N.J.D. William, an official of Burmah." Government's Memorandum of Law in Support of . . . Motion to Dismiss," dated December 2, 1976, pp. 16-17. See also Nemrow Affidavit ¶¶ 35, 36. (A276-277).

Judge Knapp made no mention of these three documents. Furthermore, only fragmentary portions of the Kurrus Memorandum were described in the *New York Times* article, none of which touched upon the "cover-up" alleged by Relator. See Argument at Point I, *infra*. The Court's finding at A579 that "The Maritime Administration had all of the information except for the Kurrus Memorandum" is clearly erroneous, in view of the foregoing concession. See also pp. 18-22 *infra*.

investigation. (A573-74). If so, this Department of Justice investigation was commenced after Relator's suit was instituted on September 30, 1976. (A522, 573-575).

Issues Presented

1. Did the District Court err as a matter of law in dismissing the complaint for lack of subject matter jurisdiction under the False Claims Act [31 U.S.C. §232(C)], where the Relator at the time of filing of suit supplied the Department of Justice with documentary evidence and information of an alleged fraud consisting of an originally-authored complaint and ten documents (or sets thereof), at least one of which (the "Kurrus Memorandum"), concededly was not prior to the filing of suit in the possession of the Government?

2. Was it clearly erroneous for the Court to find that information contained in the Kurrus Memorandum was fully described in an August *New York Times* article and hence was "public knowledge"?

3. Was it clearly erroneous for the Court to find that the information contained in the Kurrus Memorandum was in the possession of the Department of Justice and that the "memorandum itself would inevitably have been acquired" by the Department of Justice? Did such a finding justify the denial of jurisdiction?

4. Where a Relator acquires, compiles, and organizes information and evidence about a fraud perpetrated upon the United States strongly suggesting the complicity of certain Government officials, portions of which information and evidence were scattered among various agencies of the Government but the totality of which was never before organized and compiled, and the Relator assembles and presents that information and evidence in an original

complaint, does Section 232(C) of the False Claims Act give Relator the right to prosecute her action, in the absence of any prior public Government investigations, complaints or hearings?

5. Are documents and information in the possession of a Government agency chargeable with possible complicity in a fraud upon the Government to be considered and to be deemed information in the possession of the Government for the purposes of determining jurisdiction under the False Claims Act.

6. Did the United States of America act timely in entering a special appearance on December 2, 1976, for the sole purpose of moving to dismiss the complaint for lack of jurisdiction, and did it have the power and authority to make such a motion under the provisions of the False Claims Act, or otherwise?

The Statute Involved

The False Claims Act dates back to 1863 (Act of March 2, 1863, Chap. 67, 12 Stat. 696). It was reenacted as Revised Stat. §§3490-3494, 5438. The clearly expressed Congressional purpose was to "protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the Government instrumentality upon which such claims were made." * The pertinent civil prohibitions for this action, as evolved over a span of over 100 years, are codified in 31 U.S.C. §§231-235 (1970) and are set forth in the Addendum to this Brief.**

* *Rainwater v. U.S.*, 356 U.S. 590, 592 (1958). See discussion of legislative history, *infra*, at pp. 37-46.

** Because Title 31 apparently has not been enacted into positive law, the official text of the Revised Statutes is also set forth in the Addendum. See *United States v. Bornstein*, 423 U.S. 303, 305-307 at n.1.

Statement of Case

The carefully documented, thoroughly investigated complaint in this action presents a complex set of factual allegations raising novel issues of law never before squarely presented for judicial determination.* At its heart is an allegedly massive fraud perpetrated by subterfuge on the Government in connection with applications for and the grants of loan subsidies and guarantees obtained by the principal defendants under Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§1101, *et seq.*) and the United States Shipping Act of 1916, as amended (46 U.S.C. §801, *et seq.*). (A504; 509-516.)

Relator urges that the purport of these statutes, embodied in their express statutory language, is to ensure that loan subsidies and guarantees be granted only for the benefit of and to U.S. citizens and *not* to or for the benefit, directly or indirectly, of foreign entities. Relator further contends that the subsidies and guarantees which are the subject of her complaint were allegedly granted for the benefit of the defendant, Burmah, a Scottish corporation and thus a foreign entity, and are therefore illegal. (*ibid.*) (CA 5)

The Complaint (A4-27)**

The verified complaint alleges that the scheme to defraud the Government commenced in July 1972, and is continuing (A12-22); and that as a direct result the Government to date has been induced to disburse "in excess

* The defendant-appellee, C. Y. Chen was involved in a somewhat different scheme in the late 1940's. See *Meachem Corp. v. United States*, 207 F. 2d 535 (4th Cir. 1953) *cert. dismissed*, 348 U.S. 801 (1953).

** On this appeal from an order of dismissal the allegations of the complaint must be accepted as true. *Carr v. Learner*, 547 F. 2d 135 (2d Cir. 1976). 5 Wright and Miller, *Federal Practice and Procedure*, Civil § 1350, pp. 551-553 (1969).

of \$60 million" of taxpayers' money to or for the benefit of certain of the defendants. (A21).*

The complaint further alleges that defendants made, or conspired to make false statements relating to American citizenship in certain applications to the Maritime Administration for ship construction subsidies and loan guarantees in respect of nine ships designed to transport liquefied natural gas ("LNG").** (A12).

Relator contends that unless this Court permits the maintenance of this *qui tam* action, the Government has been and will continue to be defrauded of these many millions in the form of construction subsidies and government insured loans and guaranteed mortgages, approved by MarAd. In addition to the statutory penalties and damages prescribed under the False Claims Act, Relator seeks a declaration that the defendants' Titles V and XI applications are void; an injunction prohibiting the defendants from obtaining any federal funds pursuant to these applications; and forfeiture to the United States of the vessels which are the subject of these applications.*** (A24-25).

* As of November 26, 1976, "approximately \$79 million" has been paid to the defendant General Dynamics Corporation. [Affidavit of Samuel B. Nemirow, Esq., General Counsel of MarAd, ¶ 18] (A270).

** This is a natural gas converted by pressure and cooling to a liquid state at a temperature of minus 259°F. As a liquid, it occupies approximately 1/600th of its volume as a gas and can be economically shipped over long distance in specially designed ships. (A9).

*** The vessels are being constructed by defendant-appellee General Dynamics Corporation at a total cost of approximately \$825 million. The first three vessels, being built at a contract price of approximately \$280 million, are in the final stages of construction at that company's Quincy, Mass. shipyard. It is anticipated that the first vessel will be ready for delivery some time during May of 1977. (A270). [See affidavit of Mathias E. Mone, sworn to March 2, 1977, on behalf of certain defendant-appellees on file with this Court ("the Mone Affidavit")].

Turning to specific factual allegations in the complaint, it is alleged that at some time in 1972, the defendant Burmah decided to enter into the business of ocean transportation of LNG. Burmah (through subsidiaries) entered into two Transportation Agreements to transport LNG for shippers, as follows:

- (i) on June 26, 1972, with a joint venture of two New Jersey utilities to carry LNG from Algeria to the United States (the "Easco Transaction"); and
- (ii) on September 28, 1973, with an Indonesian state-owned company to carry LNG from Indonesia to Japan (the "Pertamina Transaction") (A9-10).*

Burmah in 1972 and 1973 lacked the vessels necessary to transport LNG and to perform under the transporta-

* The references in this brief, in the complaint and in the Record to the Cryogenic Companies relate solely to the Easco Transaction, the interim financing for which was consummated in August 1974. (A21, 270). The three vessels for this transaction are allegedly nearing completion with permanent financing scheduled for the late spring of this year. (See Mone affidavit).

References to the Cherokee Companies relate solely to the Pertamina Transaction. Applications for financing in connection with this transaction, while first filed in 1973, were at the time of the filing of this suit, still pending before MarAd and had yet to be consummated. *The two transactions are treated separately.* (A9-10, 69-74, 75-83, 266-270, 270-273, 456-472).

The Pertamina Transaction has been totally recast since the filing of the complaint. As recast, the defendant General Dynamics Corp. on January 19, 1977 received from MarAd a \$727 million loan guarantee for the purpose of constructing five to seven ships to convey LNG between Indonesia and Japan. The grant of these guarantees in January 1977 to say the least has been controversial. See *The New York Times* of January 31, 1977, p. 20, the editorial "Of Ships and Contracts, with Envy?"; Janeway, "Lame Duck Legacy Left by Richardson", *The Washington Star* of January 30, 1977; "The Outrageous General Dynamics Loan Guarantee" (Remarks of Senator Proxmire) in *The Congressional Record*, S.2207-08 (Feb. 3, 1977).

Should the dismissal of this action be reversed, Relator will seek leave to file an amended and supplemental complaint, incorporating these material subsequent events.

tion agreements, and thereupon devised means to acquire ships with Government financing. (A9). Burmah arranged to have ships constructed for it at a United States shipyard, so as to attempt to take advantage of and attempt to benefit from:

- (i) United States Construction-Differential Subsidies ("C.D.S. Financing"), authorized under Title V of the Merchant Marine Act of 1936 (46 U.S.C. §§1151-1161), and
 - (ii) United States Government Loans under Title XI of the Merchant Marine Act of 1936 ("Title XI Financing") (46 U.S.C. §§1271-76).
- (Complaint ¶¶19-23) (A9-12).

Indisputably, only citizens of the United States, as defined in the United States Shipping Act of 1916, and under the Merchant Marine Act of 1936 are eligible for C.D.S. Financing or for Title XI Financing. A United States citizen is defined for that purpose in Section 2 of the Shipping Act of 1916, *as amended* [46 U.S.C. §802]. (A11-12). That statute specifically provides that a corporation is *not* a United States citizen:

"... or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) *if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.*" (A11-12) (emphasis added)

The complaint further alleges that Burmah, with certain of the other named defendants, caused corporations to be formed here in the United States as ostensible Amer-

ican-controlled entities, but which in reality were controlled by Burmah; and that under the pretext that the applicants for subsidies were U.S. citizens, deliberately false applications were submitted to MarAd. (A6-16; 18-21).*

It is these transactions and the applications to MarAd for financing which are the subject of this action, and which Burmah's very own counsel characterized in the Kurrus Memorandum as a "fiction"!! (A49).

Thus at paragraph 24 of the complaint, Relator alleges:

"24. (a) Burmah and Kulukundis . . . entered upon a plan and conspiracy with certain of the defendants, aided and abetted by other of the defendants, as more particularly hereinafter set forth, to deliberately defraud the United States in connection with applications for C.D.S. Financing and Title XI Financing for construction of vessels to transport L.N.G. by, among other things, causing the applicants for said financing to falsely be given the appearance of United States citizens, when in truth, in fact, the applications were for the benefit of BOCL, its subsidiaries and affiliates which were the real parties in interest.

(b) Burmah in actuality dictated the terms of the transactions hereinafter described, arranged the financing, and underwrote and guaranteed the costs in connection with substantially all the transactions herein alleged.

"25. (a) Pursuant to the foregoing plan and conspiracy, Burmah, Kulukundis, Chen, Cuneo and certain of the other individual defendants in 1972 caused the Cryogenic Companies and the Summit

* Certain additional alleged facts relating to the issues of false citizenship and of control by Burmah are set forth at Point VI, *infra*.

Companies to be organized and in 1973 caused the Cherokee Companies to be organized.

(b) All costs and expenses of the Cryogenic Companies, the Summit Companies and the Cherokee Companies, including officers' salaries and legal fees, among other expenses, have been borne by Burmah either directly or indirectly." (A12-13).*

At paragraphs "27" and "29", Relator pleads:

"27. (a) In August 1973, the Cherokee Companies, except Cherokee V Shipping Corporation, made applications to MarAd for C.D.S. Financing and Title XI Financing. Amended applications were filed in October 1973. In February 1974 Cherokee V Shipping Corporation filed with MarAd an application for C.D.S. Financing and Title XI Financing.

(b) In connection with the applications on behalf of the Cherokee Companies, except Cherokee V Shipping Corporation, Bullitt represented to MarAd that he was the legal and beneficial owner of all of the common stock of each of the applicant corporations and he executed and caused to be delivered affidavits of United States corporate citizenship.

(c) In fact, in so doing he was acting on behalf of Burmah and at the instructions of Burmah and Kulukundis.

(d) The application and affidavits for the Cherokee Companies were false and fraudulent." (A-14-15).

* In the complaint BOCL refers to the defendant The Burmah Oil Company Limited (§ 5 at A5); "Burmah" as used in the complaint means collectively the defendants BOCL, Burmah Oil Tankers Limited, and Burmah Oil Incorporated. (A5-6).

"29. (a) In July 1972 the Cryogenic Companies made applications to MarAd for C.D.S. Financing and Title XI Financing.

(b) In connection with the applications on behalf of the Cryogenic Companies, Durbin, or others presently unknown, acting under his direction and under the direction of Burmah and Kulukundis, represented that he was the legal and beneficial owner of all the common stock of each of the applicant corporations and he or persons acting pursuant to his instructions executed and caused to be delivered affidavits of United States corporate citizenship.

(c) In fact, in so doing he was acting on behalf of Burmah and at the instructions of Burmah and Kulukundis.

(d) The application and affidavits for the Cryogenic Companies were false and fraudulent." (A15).

The Relator thereafter pleads with specificity the complex arrangements carried out allegedly as part of the fraud. (Complaint ¶¶ 31 through 35) (A16-20). At paragraph "37", Relator pleads how defendants have benefited. (A21). At paragraph "38", Relator pleads the complicity of MarAd as follows:

"38. The MarAd Administration, or at least some of its personnel, have closed their eyes to the realities of the arrangements and have permitted the defendants to proceed as alleged herein, and they have in the past permitted other foreign citizens to wrongfully benefit from C.D.S. Financing and Title XI Financing, directly or indirectly." (A21).

At paragraph "40(c)", Relator pleads that

"All of the commitments from MarAd, the subsidies, the guarantees and payments, as alleged in this com-

plaint, were for the benefit of foreign citizens and particularly BOCL, the real party in interest in all of the aforesaid transactions, and accordingly are illegal." (A23).

At paragraphs "41", "42", "44", and "45", Relator alleges:

- "41. (a) The defendants and each of them named herein at relevant times, as alleged herein, have deliberately made or caused to be made, presented or caused to be presented, or aided and abetted therein, for approval and payment by MarAd and the United States of America, claims for C.D.S. Financing and/or Title XI Financing, knowing such claims to be false or fraudulent, and each knowing that he or it would directly or indirectly benefit thereby. (A23).
- "42. These defendants for the purpose of obtaining or aiding to obtain written commitments for C.D.S. Financing and/or Title XI Financing in connection with the construction of LNG vessels by General Dynamics at Quincy, Mass. for the benefit of Burmah, as well as their own respective, individual and corporate benefits, deliberately made, used or caused to be made, or used false applications, accounts, claims, certificates, affidavits and other documents, knowing the same to contain false and fraudulent statements and knowing same to be part of an artifice, plan, conspiracy and scheme to defraud the United States of America. (A23-24).
- "44. All of the foregoing was done deliberately with the intent to obtain financing from the United States of America which would ultimately benefit these defendants directly and indirectly and which

these defendants knew could not be obtained if all the true facts had been disclosed.

- "45. There has not been a full disclosure to the United States of America, including the Department of Justice, or to MarAd, of all the essential facts relating to the foregoing." (A23-24).

The truth of the allegations of the complaint can never be proved if the opinion and judgment of dismissal by the District Court are sustained. Relator contends that the dismissal was the result of a strained interpretation of the False Claims Act bottomed upon the District Court's clearly erroneous finding that *all* of the substantive information had been in possession of the Government prior to September 30, 1976.

The Information Furnished the Government on September 30, 1976, by Relator and the Government's Contentions With Respect Thereto

In addition to the Complaint, an original document, Relator on September 30, 1976, sent to the Department of Justice the following documents and compilations:

1. an undated internal memorandum from the files of Burmah (A30-46);
2. the Kurrus Memorandum (A47-49);
3. a second memorandum dated August 21, 1975 from Kurrus to McMullen (A50-54);
4. a 63-page Memorandum of Law dated September 16, 1975, authored by the firm of Kurrus and Jacobi, Esqs. (A55-124);
5. two complaints prepared for and on behalf of Burmah for actions in the Supreme Court of the State of New York ["5(a)" and "5(b)" to Schedule A] (A125-154);

6. a folder of news releases consisting of some 66 pages (A155-228);*
7. a Memorandum of Law relating to self-dealing of Kulukundis, authored by the law firm of Seymour & Patten, Esqs. (A229-241);
8. two memoranda of interviews dated July 28, 1975 and November 14, 1975 with Kulukundis ["8(a)" and "8(b)" to Schedule A] (A242-262).

The Government contends that all of the information contained in the foregoing documents was in possession of the Government prior to September 30, 1976. In so arguing it relies on the fact that some of the information, but not all, was in the possession of (i) MarAd; (ii) Congressman Les Aspin; (iii) the Department of Justice; (iv) the Securities and Exchange Commission; (v) the House Committee on Government Operations; and (vi) the General Accounting Office. It is undisputed that not one of the foregoing had assembled or analyzed all the information prior to September 30th; far less, had they everything. (A276-277; 492-502).

MarAd

Relator contends (and so contended below) that MarAd was so intimately involved in the alleged fraud that its

* The news and magazine articles covered a range of subjects including alleged "insider" selling of General Dynamics stock (A165-167); Burmah's financial problems (A161-162, 224-228); Burmah's interest in the defendant Burmah East Shipping Corporation (A156); alleged international bribery and corruption in Japan and in Indonesia (A170-185, 198-220); cost overruns in connection with construction of the LNG tankers (A165); General Dynamic's denials of fraud (A168); its business generally (A155-157); alleged conspiracy by competitors (A163-166); many of the articles took their lead from a New York Times article of August 19th. (A186-197, 276).

Under date of October 2nd, Congressman Aspin, reviewed the contents of certain of these articles in a letter to Secretary of Commerce Richardson. (A525-528).

knowledge could not be imputed to the Government. See Point IV, *infra*.

As to MarAd's alleged knowledge, the Government submitted an affidavit from MarAd's General Counsel, Samuel B. Nemirow. (A264-279).^{*} The Government contended below that MarAd was informed in 1975 of the underlying factual allegations upon which the Relator's Complaint was based and that "Relator has not presented any substantive information not known to MarAd prior to September 30, 1976." (A264). However, MarAd did not have the Kurrus Memorandum. (A276-277). Nor did it have Items 1, 3, 7, 8(a) and (b) of Schedule A. (*Ibid.*) Nor had MarAd taken any action, even though Burmah itself is alleged to have notified MarAd of the underlying facts. (A273-274).

MarAd claims to have received the two New York Supreme Court complaints, documents 5(a) and 5(b) of Schedule A. (A275-276). MarAd further claims that it was aware of most of the newspaper and magazine articles, Item 6 of Schedule A. (A276). While MarAd concededly did not have in its physical possession the 63-page Memorandum of Law, authored in September, 1975 by the Kurrus law firm, its General Counsel claims to have been "shown" it some time in September 1975. (A55-124; 274). As to whether he read or reviewed it, is not stated. (A274).

As to the Kurrus Memorandum, the Government argued that since it involved meetings with personnel of MarAd, MarAd had to have known what it contained. (A277).

Elliott Richardson, then Secretary of Commerce, admitted, however, on November 17, 1976 that most of Relator's documents came to the attention of MarAd for the

^{*} Attorney Nemirow attended the first of two meetings memorialized by the Kurrus Memorandum. (A47). He did not attend the lunch later that day at which Administrator Blackwell is said to have acknowledged the fiction of the transaction and to have urged that there be no public airing of the issues. (A48-49). The Government submitted no affidavit from Mr. Blackwell.

first time as a result of this action. See page 22, *infra*. (A533).

Congressman Les Aspin

On May 25, 1976, Congressman Les Aspin (of Wisconsin) reported to the House that on March 3, 1976, he had written to Mr. Robert J. Blackwell, inquiring as to the propriety of MarAd's proposed financing of five ships for the use and transport of LNG from Indonesia to Japan. Congressman Aspin told the House that the response from Mr. Blackwell, under date of April 21, 1976 "was totally unsatisfactory." *Congressional Record* — House, May 25, 1976, page 4909. (A489).

Congressman Aspin inserted into the Record that correspondence of March 3rd and April 21st, as well as a letter he had written under date of May 25, 1976, to Congressman Jack Brooks, Chairman of the House Committee on Government Operations. (A489).

On August 19, 1976, Congressman Aspin, presumably having had no satisfactory response from MarAd, wrote to then Attorney General Edward Levi, complaining of the matter, forwarding to the Justice Department an article from the New York Times of August 19th and his correspondence with Robert Blackwell, writing:

"Today the *New York Times* reported that several agencies are investigating the application of the Burmah Oil Company for Title XI mortgage insurance guarantees for the construction of 8 LNG tankers at General Dynamics, Quincy, Mass. facility.

According to the *New York Times*, a memorandum of law prepared by a firm acting for one of Burmah's subsidiaries flatly states that affidavits of corporate citizenship submitted to the Maritime Administration "were fraudulent."

If this information is accurate, it surely constitutes prima facie evidence that some parties may be in-

volved in an effort to obtain Title XI guarantees through fraud.

I am writing to you today to request that the Department of Justice undertake an *immediate investigation* of any possible fraud in connection with this case. It is obvious that we cannot tolerate anyone under any circumstances providing the Maritime Administration with fraudulent information." (emphasis ours).*

Some forty-eight days later, under date of October 7, 1976, Assistant Attorney General Thornburgh, acknowledged the Congressman's letter. (A522). He wrote, in part, as follows:

"You specifically mention and request investigation of possible fraud in the submission of affidavits of corporate citizenship to the Federal Maritime Administration in order to obtain the Title XI guarantees. In this connection we understand both the Administration and the Securities and Exchange Commission are inquiring into this matter. I am, therefore, communicating with both of these agencies requesting all pertinent information. Upon receipt of that data, a determination will be made as to what further action would be appropriate by the Department." (A522).

The Relator's data, however, had already been received on October 4th, by the Department of Justice (A497); and neither MarAd nor the Securities and Exchange Commission had all of Relator's data; nor had either agency made public or communicated to the Department of Justice, any findings. See discussion, *infra*.

Congressman Aspin, presumably not having had a response to his August 19 letter from the Justice Depart-

* The letter from Congressman Aspin was referred to by the Department of Justice but not produced (A496). It is Exhibit 2 to Appellant's motion, dated March 25, 1977, on file with this Court.

ment, wrote under date of October 2nd, complaining of the matter to Secretary of Commerce Richardson (A523-529). Secretary Richardson responded at length on November 17, 1976 (A530-536), and in part referred to the pendency of this action (filed some 48 days before), as follows:

"As you may be aware, the forfeiture contention is currently the subject of civil litigation in federal district court in New York. *In this civil action, most of the documents which have been the basis for media reports, such as The New York Times article of August 19, have been brought to light* and as a consequence, MarAd has recently been able to review these documents—*most of them for the first time*. Nothing in them, including the "legal memorandum" by Richard Kurrus, would lead MarAd to change its belief that the LNG vessels are not subject to forfeiture." (emphasis ours) (A533).*

Thus Secretary Richardson conceded that certain of Relator's documents had never before come to the attention of MarAd and that as a consequence of Relator's action MarAd "has recently been able to review" them, and "most of them for the first time."**

The Department of Justice

The Court below found that the Department of Justice prior to September 30, 1976 had only (i) Congressman Aspin's remarks in the Congressional Record and (ii) the New York Times article of August 19th, presumably obtained as a result of the Congressman's letter of August 19th. (A579).

The letter of Assistant Attorney General Thornburgh of October 7th establishes that as of that date the Depart-

* The "legal memorandum" was item 4 to Schedule A of Relator's complaint (A55-124).

** Secretary Richardson's admission contradicts the sworn affidavit of Samuel B. Nemirow, General Counsel of MarAd. (A274-277).

ment of Justice was relying upon MarAd's and the SEC's inquiries into the matter and is an admission that it had not prior thereto commenced an investigation. (A522). Of course on October 4th, the Department of Justice had received Relator's complaint and the ten documents, mailed on September 30th. (A497). But the SEC had none of these documents. (A501-502; 506-508). See *infra*.

Under date of April 9, 1975, Deputy Assistant Attorney General Leon Ulman in the Office of Legal Counsel of the Department of Justice, had sent a "Memorandum" to Dudley Chapman, Associate Counsel at the White House. When he submitted that Memorandum he had none of the documents which Relator furnished or which the Government now claims was in its possession prior to September 30, 1976. And of course he did not have the Kurrus Memorandum. (A481-488).

The Securities and Exchange Commission (A501-502)

The Court below found that the Commission "had none of the material information" prior to September 30, 1976. (A579). A staff member of the Commission, on October 18, 1976, after the filing of this action, requested Relator's counsel to furnish the Commission copies of the documents listed on Schedule A. That request was referred by Relator to the Department of Justice. (A508).

On September 8, 1976, the Commission had issued an order directing a private investigation "In the Matter of Burmah Oil Company, Ltd." and on September 24 and 27, 1976 issued *subpoenae duces tecum* to various individuals and corporations. (A501). The "acts or practices" allegedly being investigated

"... concern Burmah's relationship to various persons and entities including Energy Transportation Corporation and certain of its subsidiaries, involved in financing and chartering certain vessels to be used in the transport of LNG." (A501).

But it had not yet received any documents. It is a fair inference that the SEC received the Complaint and the documents listed on Schedule A thereof as a result of the filing of this action. (A501; 507-508).

The House Committee on Government Operations
[The "Brooks Committee"] (A221-223; 494-495)

That Committee did not have the Kurrus Memorandum. (A494-495).

In a response dated November 29, 1976 to a letter dated October 22, 1976 of inquiry from the Department of Justice, sent after the filing of this action, the Brooks Committee advised that prior to September 30, 1976, that Committee had in its possession five of the ten documents, namely those listed as numbers 1, 3, 4, 5(a) and 5(b) on Relator's Schedule A. It did not have the Kurrus Memorandum nor items 6, 7, 8(a) and (b) of Schedule A. (A494-495).

On August 2nd, the Brooks Committee asked the General Accounting Office to review certain of the issues. (A222). On August 3rd, Chairman Brooks inquired of Administrator Blackwell as to certain aspects of the Pertamina transaction. (A223).*

In June 1976 and subsequent thereto but prior to September 30th, staff members of the Brooks Committee allegedly met with officials of MarAd "on at least 5 occasions." (A278).

But by August, the Brooks Committee had still not made a determination. In a News Release it stated

"The House Committee on Government Operations has received certain allegations concerning the General Dynamics Liquified natural gas tanker program, and has had some discussions about them with the

* He did not then inquire into the Easco Transaction.

Maritime Administration, Congressman Jack Brooks (D-Tex.), Chairman of the Committee, said today.

'On the basis of these discussions, it has not yet been determined whether there is need for further committee action,' Brooks said.

The Committee has requested further information from the Maritime Administration and has asked the General Accounting Office to review the entire ship construction loan guarantee program as it is presently being operated. The committee is awaiting responses to these requests.

Copies of the letters to the Maritime Administration and General Accounting Office are attached." (A221).

The General Accounting Office ("GAO")

This office did not have the Kurrus Memorandum.

While Attorney General Thornburgh referred in his October 7th letter to this agency, the Government did not contend below that that agency had any of the information supplied by Relator. (A507; 522). MarAd did apparently turn over to the GAO its records involving the Easco and Pertamina Transactions (A278), but not any of the Relator's documents. Apparently, the General Accounting Office's review of the MarAd documents was prompted by an August 2nd letter from Chairman Brooks. (A222; 532).

***The New York Times Article of
August 19, 1976 (A158-159; 498-499)***

This article was sent to the Department of Justice by Congressman Aspin on August 19, 1976. (A496-499). It was also contained in Item 6 to Schedule A of the complaint. (A158-159). This article appeared on the front page of the Times under the headline

"BURMAH OIL'S AID BID STUDIED
FOR POSSIBLE FRAUD"

The article quotes Robert J. Blackwell as stating that his agency, MarAd,

"has no information to indicate that there was fraud of any type or wrongdoing' in the Burmah applications." (A498).*

On page 60 of the Times, the article is continued. In the second column the following is reported:

"Internal corporate documents from Burmah and confidential memoranda obtained by the New York Times pertaining to Burmah's situation show that serious questions over the legality of the guarantees and subsidies were raised by lawyers 11 months ago.

"One memorandum prepared by the firm of Kurrus & Jacobi, says: 'The continued involvement of those companies in the ship construction contracts will create a cloud on the title of the vessels and could subject them to forfeiture to the United States.' Some \$476 million is involved in these contracts alone.

The memorandum, dated September 16, 1975, said the financing arrangements 'present some extremely perilous legal problems for Burmah.' It suggested that 'forfeiture of the vessels to the United States would obviously have devastating consequences.'" (A499).**

The Times article then discusses the Kurrus Memorandum:

"Other documents obtained by The Times indicate that officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies.

In a memorandum to John J. McMullen, former president of Burmah Oil Tankers, Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975,

* The Kurrus Memorandum contradicts this.

** The reference is to the 63 page Memorandum of Law, item 4 to Schedule A of Relator's complaint (A55-124).

with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.

Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulkundis [sic], an earlier president of Burmah Oil Tankers, 'may have acted imprudently and perhaps even improperly in the deals he set up.'

Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction [sic].'

Asked about this, Mr. Blackwell acknowledged he had met with Mr. Kurrus on May 9, not May 8, 1975, and that they had discussed Burmah's problems. However, he flatly denied that he ever said that the financing arrangements had been 'based on fictions.'" (A159; 499).*

There are no further quotes from the three-page Kurrus Memorandum. The remaining reference in the Times article to the Kurrus Memorandum was—

"Mr. Kurrus expressed shock yesterday when informed that a copy of his memorandum had been obtained by the Times. When asked if he wanted it read back to him, he replied, 'Don't read it. I don't want to be trapped. That's too dangerous.'" (A499).

What the Government Did Not Know

Nowhere in the moving affidavits submitted by the Government is it even suggested that prior to September 30, 1976 the Government was aware of the alleged complicity of MarAd and that Administrator Blackwell of that agency

"... recognized the weakness in the theory as to how these deals were established and that this is what

* The article initially misquoted the word "fiction". (A159; 499).

worried him about a full fledged legal controversy between Burmah and Energy." (Kurrus Memorandum, A49).

In filing this action, Relator compiled and organized information and evidence about an alleged fraud perpetrated on the United States and its taxpayers, only *some* of which information and evidence was in possession of the Government, scattered among various of its agencies. On September 30, 1976, neither the Department of Justice, the Securities Exchange Commission, the General Accounting Office, nor any other investigative or prosecutorial agency in the Executive Branch of the Government had Relator's documents, except for the August 19th New York Times Article. And even MarAd, as a consequence of the bringing of this action, was able to review most of these documents for the first time. (A533).

ARGUMENT

POINT I

The Court's Finding That the Kurrus Memorandum "Was Fully Described" in The New York Times August 19th Article and Hence Was "Public Knowledge" Was Clearly Erroneous.

The Government had the *Times* article. It did not have the Kurrus Memorandum. *The New York Times* abridgement and the full text of the Kurrus Memorandum speak for themselves. The District Court's conclusion based on its comparison of the two documents, that the three-page, single-spaced Kurrus Memorandum was "fully described" in the *Times* article was clearly erroneous. (A48-49; 158-159; 498-499).

The Kurrus Memorandum was indeed identified in the *Times* article, but only two of that document's important

points were quoted—that Mr. Kulukundis “may have acted imprudently and . . . improperly” and that the arrangement approved by MarAd “was based on friction” [sic]. Furthermore, these points were taken out of context, so that their complete meaning was not apparent. (A499).

Highly material disclosures of factual matters contained in the Kurrus Memorandum were not reported by the *Times*. The principal omission is Blackwell’s suggestion that Burmah engage in a cover up, *i.e.* Blackwell “warned about a full fledged legal controversy between Burmah and Energy,” which would lead to exposure of the wrongdoing. (A49).*

In short, the Kurrus Memorandum contains admissions by Burmah through its counsel of the alleged fraud that were not reported by the *Times*. Without the Kurrus Memorandum there was no documentary evidence of MarAd’s complicity. See Paragraph “38” of the Complaint. (A21).

The relevant portion of the Kurrus Memorandum, dealing with the second of two meetings, is as follows: [only the italicized words were quoted in the *Times* article].

“I met with Mr. Blackwell for lunch on the same day. We had a further discussion of the Burmah-Energy problem. I explained to Mr. Blackwell that we could understand the function of the Energy companies under the Title XI insurance financing, but that the role of the Energy companies beyond that was impossible for us to understand or justify. Mr. Shelby, as I understand it, came into this deal as a lawyer representing Burmah. He and Messrs. Chen and Cuneo have put together the Energy companies and their subsidiaries in order to meet the legal requirements of United States ownership and control of (a)

* The article also omitted the alleged admission of Mr. Blackwell “. . . that there appears to be several things basically wrong with the overall structure of this deal . . .” (A49).

the company having the bareboat charter from the owner-lessor, under the leverage lease arrangement and (b) the company holding temporarily the ship-building contracts until permanent financing on the Cherokee I-V vessels can be arranged.

People having the substantial interest in a project which Messrs. Shelby, Chen and Cuneo claim usually provide something of substance. Either they have been finders, they have invented something or devised the project, put together the financing under difficult circumstances or brought the indispensable [sic] parties to the deal together. Messrs. Shelby, Chen and Cuneo appear to have done none of these things. They rather appear to us to be capitalizing on their special position under the Title XI financing and taking this further to create a vested equity interest in the deal that cannot be justified. I explained to Blackwell that we could not at this time understand the consideration for any commitment to Messrs. Shelby, Chen and Cuneo beyond the Title XI financing arrangements and that the primary purpose of a meeting with them would be to afford them an opportunity to explain what consideration, if any, on their part did exist.

I also explained that we had some serious problems concerning actions that Messrs. Shelby, Cuneo and Chen were taking that appeared to be in conflict with Burmah's interest. In this respect, I pointed out that they seem to have a continuing business association with Mr. Elias Kulukundis. Furthermore, Messrs. Shelby, Cuneo and Chen are now pursuing, according to our information, their own private LNG project or projects which involve General Dynamics, Pertamina and possibly other companies who are integral and essential parts of the Burmah project. I emphasized that we do not have all of the facts but that if the Energy people are acting in the ways that we have heard, they would be in our opinion violating legal obligations which they owe to Burmah and would be

acting improperly and illegally by interfering with Burmah's business relationships to which they have been introduced while they were ostensibly acting on Burmah's behalf.

I also pointed out that this was not a situation where the Energy people had supplied any significant capital investment on their own. All expenses, costs and fees have been paid by Burmah. Under these circumstances, Burmah we feel has a legal right to prevent the Energy people from assuming any larger or different role than their involvement as a conduit in the Title XI financing arrangement contemplated.

Mr. Blackwell stated that he could appreciate this problem but that it was obviously not Marad's problem. He said that he felt that Mr. Kulukundis *may have acted imprudently and perhaps even improperly in the deals he set up*, but that Burmah had permitted him to operate, had given him a cover of authority and had perhaps even countenanced the deals.

I explained that the real probelm [sic] *vis a vis* the Energy people arose because of the special legal problems concerning the Title XI financing and that *everyone recognized* that the structure that Marad had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A. J. Chandris, etc.) *was based on a fiction*. He said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly

and unconscionably through a United States Government contract.

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible. He agreed that Burmah must take its own actions to place this deal on a sound legal as well as economically feasible basis. I asked him to bear with us in attempting to work out these problems and stated that we would keep him informed of developments." (A48-49).

Hence, the District Court's findings that the Kurrus Memorandum was "fully described" in the *Times* article and therefore "public knowledge" and that its contents constituted substantive evidence in possession of the Government prior to September 30, 1976, were clearly erroneous. Without such an erroneous finding, Relator could not have been denied jurisdiction to prosecute her claims. *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949); *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F.Supp. 1038 (W.D. Pa. 1973).

Judge Knapp assumed in his opinion that the Kurrus Memorandum constituted substantial new information contributed by Relator which was not in the possession of the Government at the time Relator filed suit. (A577). This assumption and the District Court's finding that the Kurrus Memorandum contained information "... from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it," (A576) precluded, as a matter of law, dismissal for failure to meet the jurisdictional requirements. This finding is even more incomprehensible in the light of the District Court's other finding that evidence of MarAd's complicity in the alleged fraud indicated in the Kurrus Memorandum is not "information in the possession of the Government." *

* The Kurrus Memorandum also corroborates certain of the statements contained in Item 1 of Schedule A, an undated and

The finding that the Government did not possess the Kurrus Memorandum at the time the suit was filed required the Court to deny the motion to dismiss.

POINT II

The District Court's Finding That the Government Would "Inevitably" Have Obtained the Kurrus Memorandum Was an Unwarranted Assumption Not Supported by the Record and Erroneously Narrowed the Jurisdictional Scope of the Statute.

The entire contents of the Kurrus Memorandum had not been fully described in *The New York Times* and hence were not "public knowledge." Point I, *supra*. The District Court erroneously found that the information contained therein was in the Justice Department's possession

"and the memorandum itself would inevitably have been acquired by the Department (of Justice) in the course of its investigation had it been considered important." (A577) (parenthetical material added).

This conclusion of the District Court constitutes a gratuitous and unjustified narrowing of the jurisdictional standards provided by the statute. It was a novel departure from precedent for the District Court to apply a doctrine of inevitable discovery.

In *ex rel. Vance v. Westinghouse*, *supra*, such a theory was rejected. In *Vance* the government possessed all the

unsigned Burmah internal memorandum (A30, 32-37 et seq.). The District Court also erroneously found that MarAd was in possession of Items 7, 8(a) and 8(b) to Schedule A (A229 to 262, 579). The Government conceded that MarAd was not in possession of these documents on September 30, 1976. Nemirow affidavit, ¶ 35 (A276). These documents substantiate the problems Burmah was having with its former chief executive officer, Kulukundis, and his alleged disloyalty to Burmah, which are also alluded to in the Kurrus Memorandum. (A48 to A49).

bills and invoices which established fraud by way of overcharges and had commenced an audit of such bills and invoices when the relator filed his suit. Nevertheless, the court held that

"We do not consider the fact that the government may have had in its possession certain documents, bills, invoices, contracts, etc. as conclusive of the matter at all, if the underlying information with respect to the same is developed by the plaintiff . . . [t]he fact that the government may have had the bills and invoices in its possession covering the amounts of the claims involved, does not necessarily show that the government had the underlying facts in its possession to show the claims were padded or fabricated . . ." 363 F. Supp. at 1043.

The court in *Vance* then expressly rejected the contention that the government audits already in progress would have inevitably discovered defendant's alleged fraud. *Ibid.* at 1044. The decision concluded that to dismiss a False Claims Act suit where the government had not, at the time the suit was filed, already

" . . . thoroughly develop(ed) all the facts . . . would completely defeat the purpose of the Act."

Ibid. at 1045.

In our case the government did not yet even possess the document in question, much less had it "thoroughly developed all the facts" revealed by the Kurrus Memorandum at the time Relator filed suit.

In a strained effort to justify dismissal, Judge Knapp innovated the "inevitable discovery" doctrine and engrafted it into the plain language of the statute. Not only was the Kurrus Memorandum not in possession of the Government, it contained new substantive information never before in the Government's possession as to motiva-

tion, state of mind and intent underlying the alleged fraud on the Government.

Further, there was no basis in the Record for the District Court to find that the *New York Times* or even Attorney Kurrus would have freely turned over the Kurrus Memorandum at the request of the Government.*

POINT III

Relator Has Performed a Public Service in Bringing to Light Evidence of an Alleged Fraud and Alleged Complicity of a Government Agency, Having Assembled and Submitted to the Government New Substantive Information and Evidence Not Theretofore in Its Possession. The False Claims Act Was Enacted to Grant Jurisdiction to Private Citizens to Sue Under Precisely These Circumstances.

The Government did *not* establish, as is required by Section 232(C) of the Act, as a prerequisite to dismissal, that it was in possession of *all* "evidence or information" submitted by Relator. Nor can it. The Government's moving papers, on the contrary, reveal that the Government *did not have all the substantive information, did not have all the documents, and did not have all the evidence*. What it did have was not organized or assembled and was scattered throughout the "vastness" of the Washington federal establishment. *Cf. Bateson-Stolte, Inc. v. The United States*, 305 F.2d 386 at 388 (Ct. of Claims, 1962).

To be sure, certain of the information was buried in the archives of various federal agencies. It was, however, dis-

* The *New York Times* on occasion has opposed subpoenae for documents in its possession. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). Attorney Kurrus would have been obliged to raise the attorney-client privilege inasmuch as the Burmah defendants themselves in this action attempted to preserve that claim. See Record Document No. 7; Consent Order and Stipulation filed December 6, 1976 (A2).

organized and not analyzed nor integrated—an all too familiar problem. Congressman Aspin had been repeatedly frustrated by MarAd's "unsatisfactory" replies to his inquiries, a task made far more onerous by that agency's obvious desire to cover up its own complicity. (A49). Even the Department of Justice moved slowly until after the filing of this action. (A522). Only after Relator's Complaint and the ten documents were filed with the Justice Department did it take action, prompted by the fact that it was then faced with a statutory duty to respond within sixty days. 31 U.S.C. §232(C).*

The complex facts disclosed by Relator's Complaint had not previously been accessible to any one agency of the Government. These facts are like a jigsaw puzzle composed of many pieces, with missing parts. Relator took these pieces, laboriously added the missing pieces, and in her complaint portrayed a clear picture which had not been seen or examined before by a disinterested agency of the Government.

Congress realized that granting private citizens the right to sue to recover Government monies paid out as a result of fraudulent claims would be an important check on bureaucratic abuses—in certain carefully restricted circumstances—and a valuable adjunct to governmental prosecutorial activity. Compare *J. I. Case Co. v. Borak*, 377 U.S. 426, 434, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir. 1973), *cert. den.* 416 U.S. 905 (1974).

The False Claims Act is remedial in nature and has been interpreted by the Supreme Court broadly. *United States v. Bornstein*, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); *United States v. Neifert-White Co.*, 390 U.S. 228, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968); *United States*

* It actually responded on the sixty-third day. Query: Why hadn't the Justice Department moved earlier? See Point V, *infra*.

ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943).

Remedial statutes are to be construed to effectuate the purpose intended. *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 80, 195, 84 S. Ct. 275, 11 L. Ed. 2d 337 (1963); *J. I. Case v. Borak*, *supra*, at 433. Cf. *Abrahamson v. Fleschner*, — F.2d —, [Current] CCH Fed. Sec. L. Rep. ¶95,889 at pages 91273-91274 (2d Cir. 1977).

As will be evident from the following review of the Act's history, Congress in amending the False Claims Act in 1943, did not intend to deny access to the Courts, except where it was clear that a relator was merely copying public information. A denial of access here is in effect a denial of a remedy, which should not be countenanced.

The Legislative History of the False Claims Act

American "*qui tam*" statutes are almost as old as the United States itself. See Note, "Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions," 67 Northwestern U. L. Rev. 446, 451 n. 21 (1972); Note, "Qui Tam Actions: The Role of the Private Citizen in Enforcement," 20 UCLA L. Rev. 778 (1973). The Federal False Claims Act was enacted by Congress in 1863 (Act of March 2, 1863, Ch. 67 12 Stat. 696) but languished virtually unchanged and unlitigated until the 1940's. 67 Northwestern U.L. Rev. at pp. 453-54.

There is nothing novel about frauds on the United States Government. The Courts and commentators recognize that the original impetus for the Act was the widespread fraud in making claims in connection with the supply of goods and services to the federal government during the Civil War. The purpose of the Act was to encourage the apprehension of profiteers by providing reasonable financial incentives to private parties to expose and prosecute fraud against the Government. *United States v. Bornstein*, *supra*

at 309-310, n. 5 ; *U.S. ex rel. Marcus v. Hess*, *supra* at 544; *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *U.S. v. McNinch*, 356 U.S. 595 at 599 (1958); see 67 Northwestern U.L. Rev., *supra*, at 453-54; 20 UCLA L. Rev., *supra*, at 788.

"The Supreme Court has said that the congressional purpose behind the False Claims Act was to 'protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.' *Rainwater v. United States*, *supra*, 356 U.S. at 592, 78 S.Ct. at 948. In short, the purpose was to stop the 'plundering of the public treasury.' *United States v. McNinch*, *supra*, 356 U.S. at 599, 78 S.Ct. 950. While it is clear that the False Claims Act was not designed to reach every kind of fraud practiced on the United States, *United States v. McNinch*, *supra*, at 599, 78 S.Ct. 950; . . . it is equally clear that its purpose was to reach 'all fraudulent attempts to cause the Government to pay out sums of money.' *United States v. Neifert-White Company*, *supra*, 390 U.S. at 233, 88 S.Ct. at 962."

[*United States v. Silver*, 384 F. Supp. 617, 619 (E.D. N.Y. 1974), *aff'd* 515 F.2d 505 (2d Cir. 1975).]

There are apparently no available records of the 1863 proceedings in the House of Representatives nor any committee reports by either the House or Senate. *U.S. v. McNinch*, *supra*, at 600. The Senate proceedings of 1863 were principally concerned with a controversial provision in the bill, deleted before its passage, which would have conferred military status upon civilian contractors and suppliers to the Government.*

* This would have subjected them to court-martial rather than civilian judicial proceedings, and was roundly condemned as a violation of the Constitutional guarantee of due process. See *Congressional Globe*, 37th Congress, 3rd Sess. (1863), pp. 952-955.

The Senate sponsor of the 1863 bill (S. No. 467) was Senator Howard of Michigan. His comments on the Senate floor in support of the bill are excerpted below.*

Upon final passage of the initial statute, there was apparently complete agreement that the principal of "setting a rogue to catch a rogue" was favored by the Congress. 67 Northwestern U. L. Rev. *supra* at 449-450, n. 16. The bill as originally enacted provided for a private litigant to receive one-half of any damages and forfeitures collected, plus costs. However, the entire risk of an unsuccessful conclusion to the litigation was upon the private litigant, who was required to assume all costs and expenses of prosecuting the action.**

In 1878, Congress separated the criminal and civil provisions of the Act.

"The civil sanctions were codified as section 3490, while the criminal provisions were separately enacted as section 5438. Section 3490 permitted the government

* SENATOR HOWARD:

"... [T]his bill has been prepared at the urgent solicitation of the officers who are concerned with the administration of the War Department and Treasury Department . . . respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war . . . (The bill outlaws) making or presenting a fraudulent claim to the Government of the United States or any of its Departments or officers." *Cong. Globe* at 952. (parenthetical material ours). See also *United States v. McNinch*, *supra*, at 599-600, ns. 7-9.

"... [O]ur Treasury is plundered from day to day by bands of conspirators, who are knotted together . . . for the purpose of defrauding and plundering the Government." *Ibid.* at 955.

"In short . . . I have based the 4th, 5th, 6th and 7th sections (including the qui tam provisions) upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue', which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." *Ibid.* at 956. See *Congressional Globe*, *supra*, 952-58.

** These features are still incorporated in the Act, except that a Relator's recovery may not be greater than 25% in certain circumstances and 10% in others. 31 U.S.C. § 232(B); 31 U.S.C. §§ 232 (E)(1), 2.

to recover forfeitures and damages for those acts prohibited by section 5438 . . ." *Rainwater v. U.S.*, *supra*, note 8 at 592-593.

In 1918 Congress amended the criminal provisions of the Act expressly to include false claims against "any corporation in which the United States of America is a stockholder." 40 Stat. 1015. An insubstantial substitution of words was made in 1936. See Act of June 25, 1936, ch. 804, 49 Stat. 1291.

The pattern of widespread corruption which led to the passage of the Act again mushroomed during World War II, leading to a significant amount of litigation under the Act. See 67 Northwestern U.L. Rev., *supra*, at 455.

Included among these was a new breed of suit which became known as the "parasitic" False Claims Act suit. These were cases where, following a criminal indictment for defrauding the federal government, private litigants merely copied, frequently *in haec verba*, the indictment and findings of the grand jury into their own civil complaints. The Justice Department found itself forced to prepare its own civil complaints prior to obtaining any indictment in order to win the race to the courthouse. 89 Cong. Rec. 7571, 7572 (1943).

One of these cases led to the 1943 amendments to the Act. That case, *Marcus v. Hess*, *supra*, involved the rigging of bids by electrical contractors on Pittsburgh Public Works Administration projects. The Third Circuit denied recovery to the private litigant on the ground that Congress, when it enacted the statute, did not intend to reward those who merely copied government indictments. 127 F.2d 233 (1942).

The Supreme Court reversed. It found that the Act did not specifically require that the private litigant contribute any new information. The purpose of the Act was to encourage private suits to recover money from those who

would "cheat the United States", and this purpose was not inconsistent with piggybacking on government indictments. The decision concluded that only Congress, and not the Supreme Court, could change the law so as to prohibit so-called "parasitic" civil actions. 317 U.S. at 544-46.

Mr. Justice Jackson dissented, urging that Congress did not intend to reward private litigants unless they based their suit on information not in the possession of the Government and following an analysis in an *amicus* brief which had been submitted by the Department of Justice.

After that decision, then Attorney General Biddle sent a memorandum to Congress to revise or entirely eliminate the *qui tam* provisions of the False Claims Act. See S. REF. No. 291, 78th Cong., 1st Sess. (1943). Biddle said that the competitive scramble with private litigants was impairing the ability of the Justice Department effectively to prosecute fraud against the Government. He said the Government no longer needed private attorney generals as it had in 1863, when the statute was enacted. By the end of 1943, approximately 250 suits seeking damages totalling \$144 million had been filed by private litigants. See 89 Cong. Rec. 7581, 7572, and 10,845-46 (1943).

Congress responded by enacting the amendments of 1943. In March of that year the House of Representatives passed H.R. 1203, entitled "A Bill to Eliminate Private Suits for Penalties and Damages Arising Out of Frauds against the United States," which would have entirely proscribed *qui tam* actions. This bill was rejected by the Senate. The bill which ultimately was passed into law merely limited *qui tam* actions, at the same time severely reducing the share of any recovery to which the private litigant would be entitled. See 89 Cong. Rec., supra, at 7571-80 and 7596-97 *passim*. The 1943 Act, therefore, reaffirmed a continuing Congressional belief in the efficacy and usefulness of *qui tam* actions, while controlling certain abuses which had grown along the fringes of the original legislation.

When in March of 1943, the House of Representatives had passed H.R. 1203, the House's action was substantially without debate. 89 Cong. Rec. 7577 to 7578 (1943).

Thereafter the Senate Committee on the Judiciary, Chaired by Senator Van Nuys, introduced into the Senate a modified version designed to eliminate the *qui tam* suit only under certain conditions. See Sen. Rep. No. 291, 78th Cong. 1st Sess. (1943). Even these conditions were subsequently liberalized after debate and conference committee action by the Senate and House.

The Senate Debates on H.R. 1203

As reported to the full Senate by the Committee on the Judiciary, it was proposed that H.R. 1203 amend Section 3491 of the Revised Statutes (31 U.S.C. §232) as follows:

"A suit may be brought and carried on by any person, for himself and the United States, at his own costs in the name of the United States, but shall not be withdrawn without consent in writing of the judge of the court and the district attorney: *Provided*, That no district court of the United States shall have jurisdiction to hear, try, or determine any such suit, *unless based upon information, evidence, and sources original with such person and not in the possession of or obtained by the United States in the course of any investigation or proceeding by it* and unless prior to commencement thereof (1) such person has made full disclosure in writing to the Attorney General of the grounds thereof and has requested the Attorney General to cause such suit to be brought; and (2) the Attorney General has, after receipt of such disclosure and request, declined in writing to comply with such request, or has allowed six months to elapse after receipt of such disclosure and request without causing a suit to be brought: *Provided further*, That in the event the Attorney General takes action following receipt of such disclosure

and request, the court may award to such person out of the proceeds an amount fair and reasonable, which amount shall in no event exceed one-tenth of such proceeds." * (emphasis added) (Sen. Rep. *ibid.* at p. 1-2)

In the Senate, there was little debate over Section 232(B) which provides:

(i) the action should be brought in the name of the United States, but may not be withdrawn or discontinued without the consent of the Court; and

(ii) the action shall be prosecuted at the sole cost and the charge of the relator. [31 U.S.C. §232(B)]

However, the issue as to whether *qui tam* suits should be eliminated in their entirety or, if not, how they should be jurisdictionally limited, received substantial attention. 89 Cong. 7570 to 7616, *passim*. While there were some in the Senate who favored elimination of such suits, most Senators favored placing jurisdictional limitations. There was substantial debate on the issue.

Senator Van Nuys of Indiana, Chairman of the Committee of the Judiciary, who offered the amendment which would have ousted the Court of jurisdiction if the relator's suit was not

"based upon information, evidence, and sources *original with such person* and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it." (emphasis added),

offered in detail Attorney General Biddle's views. *Ibid.* 7570-7572.

* Congress also reduced the financial incentives to private plaintiffs under the Act by enacting 31 U.S.C. §§ 232(E)(1), (2), amending REV. STAT. section 3491 (1878). This eliminated the flat 50 percent of monies recovered in favor of a district court award of "fair and reasonable compensation" not to exceed 10 percent if prosecuted by the government or 25 percent plus costs and reasonable expenses if prosecuted by the private litigant.

Thus at pages 7571 and 7572, Chairman Van Nuys was concerned about copying from public government proceedings:

"In other words, the informer would have no personal knowledge of the facts at all, but would hurry to the courthouse as soon as a grand-jury indictment was returned in open court and copy verbatim the language of the indictment, changing the caption and the prayer from a criminal action to a civil action." (page 7571).

* * * * *

"MR. VAN NUYS. As I said before, the great majority of the suits—I will epitomize the number of them and the total demands in a few minutes—are simply copied verbatim from indictments returned by Federal grand juries in criminal cases. In (sic) case there was a hearing in Washington before the Truman committee relative to a matter allegedly involving fraud against the Government in the delivery of some defective machinery or other equipment. The Washington newspapers recorded the substance of the hearing. The transcript was not even written when three suits were filed in the Midwest for millions of dollars—I forget the exact amount—based solely on the testimony before the Truman committee. The informers in that case had no more real, original knowledge of the facts than did I or any other Senator. That instance is a sample of how the racketeers rush into court in an undignified, unseemly way to recover half the judgment, the other half going to the United States Government." (page 7572).

But it was clearly his intent to "protect bona fide, honest informers." (*Ibid.*),* also at pages 7608-7609.

* "Mr. VAN NUYS. Mr. President, taking up the bill at this time, and discussing it by sections, let me say that all of page 1, down to line 3 on page 2 ending with the word "suit" is written exactly in the words of the old law of 1863. *From there on we tried to protect bona fide honest informers.*" (emphasis added)

The views of those debating the issue fell generally into three categories, (i) those of Senator Van Nuys and Attorney General Biddle, *supra*; (ii) those of Senators Revercomb of West Virginia and Murray of Montana who were concerned that the United States would be left without a remedy if the Attorney General failed to prosecute and urged elimination of the foregoing language; and (iii) those of Senator Danaher of Connecticut who was concerned with defining more carefully at what point jurisdiction attached and urged that the word "investigation" be followed by the language

"by a grand jury, congressional committee or other public body, or before a United States Commissioner."

The following typified Senator Revercomb's remarks:

"Mr. Revercomb

* * *

"Mr. President, I feel that if this bill is issued in its present form the Attorney General may say 'I do not want to prosecute this suit. There is no sufficient evidence of fraud. The information was gained through a Government investigation.' But a citizen may come along and say, 'I do not agree with that view; it is wrong. If I myself had this information to begin with, and the Attorney General refused to prosecute I could go ahead and prosecute. But if I obtain the information from a Government investigation, however public the information may be, I cannot prosecute under the terms of this bill.'" (page 7573; and at 7596-7597).

Particularly, there was substantial debate over the requirement that the information had to be "original" with the relator. *Ibid.* at 7573-7576, 7596-7597; and 7609-7614.

At page 7615 Senator Wheeler of Montana moved to strike out the language "original with such person and" stating that

"If that is done, it seems to me it would eliminate one of the most objectionable features which has been

complained of, because then a citizen would not be confined to evidence which was original to him. Certainly, in Court, no person should be confined to the proposition that all the evidence must originate with him and that if he obtains evidence from such other source he cannot use it. If that were true in any trial a great many suits could not be maintained. Certainly a man should be able to use any evidence he can procure, which is not in the possession of the United States, or does not originate from a grand jury investigation or an investigation by a committee of Congress, or something of that kind.”*

Chairman Van Nuys agreed to adopt the foregoing amendment when it went to conference. *Ibid.* 7615-7616.**

From the foregoing, the intent of the Senate which, in contrast to the House, actively debated the bill, can be synthesized as follows. The Court should have jurisdiction even if the relator was not the original source of the information, provided that a relator had not copied that information from some public proceeding.

The Conference Report is found at page 10844 of Volume 89 of the *Congressional Record* and the debate in connection therewith is referred to in *United States ex rel. Vance v. Westinghouse Electric Corp.*, at pages 1041-1042, and particularly n.4 at page 1042.

The District Court's Failure To Recognize That This Is Not A "Parasitic" Action.

This legislative history further substantiates Relator's position. The District Court gave no consideration to this legislative history.

* Relator Greenberg while bringing to the attention of the Government evidence not original with her, that is, it apparently emanates from the files of Burmah and its representatives, did not copy from any grand jury investigation or from any investigation of a Congressional committee. For, at the time she filed, there had not been any. See pages 17-28, *supra*.

** The amendment was adopted and the language deleted. See, Addendum, pages SA 1-2, *infra*.

In contrast to the facts at bar, the factual patterns in the decisions relied upon by the District Court were "parasitic" by nature, the evil with which Congress was concerned, when it amended the act in 1943.

In denying jurisdiction Judge Knapp relied upon the *Vance* case, *supra*, (which supports Relator's position), upon *U.S. ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106 (S.D.N.Y. 1944), *aff'd* 149 F.2d 680 (2d Cir. 1945) and two unreported District of Columbia District Court Opinions, *United States of America, ex rel. Martin-Trigona v. Ford*, Civ. Action No. 76-1374 (Oct. 28, 1976) and *United States of America ex rel. Thompson v. Hays, et al.*, 76 Civ. 1078 (Oct. 26, 1976).

The *Sherr* action, *supra*, presented a typical example of the "parasitic" False Claims Act suit, which the 1943 amendments were intended to eliminate. The action in *Sherr* was filed the day after a federal indictment of Anaconda was reported in the *New York Times*. The Court noted that plaintiff conceded he had no original information; nor had he provided any information to the Government. The Government showed that he had copied its indictment "word for word". 57 F. Supp. at 108. In the two District of Columbia actions, the relators provided nothing new, and the Court so found. Thus in *United States ex rel. Martin-Trigona v. Ford*, the Court wrote:

"All plaintiff's information here comes from the Federal Election Commission and from a newspaper article which had been examined by the Commission staff. *In fact, this same information led to an administrative complaint which was filed at the same time as this action and is now pending before the Commission.* Plaintiff here alleges no facts or information not otherwise known to the Government and in its possession. *Neither did he make the Government more aware of the value of the information already possessed.*" (emphasis ours).*

* This language suggests that what Relator at bar did here was more than enough to sustain jurisdiction.

At bar no complaint had been filed by any Government agency; nor had any public proceeding of any nature been commenced. Relator Greenberg did make the Government more aware.

In the *Hays* case, *supra*, the Court found that

"All evidentiary material which relators are able to identify specifically seems to have been gleaned from sources in the news media. . . . The record is clear that the Justice Department was not only in possession of the same information but had in fact acted upon it prior to the filing of complaints by relators."

Here the Kurrus Memorandum, with its substantial new information, was provided by the Relator Greenberg and the Justice Department acted after the filing of her complaint.

The District Court's findings and dismissal of this action undermine the very purpose of the Act. Its ruling should be reversed.

POINT IV

The District Court Correctly Determined That Because of MarAd's Alleged Complicity, Information in the Possession of MarAd Could Not Be Imputed to the Government for Purposes of Defeating Jurisdiction Under the False Claims Act. In Any Event MarAd Did Not Have All the Information and Documents.

The role of MarAd, to say the least, is suspect. (A21; 47-49; 480). Commerce Secretary Richardson's letter of November 19th, containing the admission that many of Relator's Documents were being reviewed by MarAd for the first time, contradicts the moving affidavit of General Counsel Nemirow. (A533).

The desire of Administrator Blackwell to avoid a public legal confrontation between Burmah and the Energy Group and thereby cover up the facts and the admission attributed to him that the arrangements involve a "fiction", justify the claim of MarAd's complicity. (A49).

In *United States v. Rippetoe*, *supra*, the Court of Appeals for the Fourth Circuit, in reversing summary judgment in an action brought under the False Claims Act, wrote at p. 736:

" * * * In the first place, we do not think it incumbent upon plaintiff to negative knowledge on the part of government officials of the evidence upon which his action is based. The provision of the statute is that when 'it is made to appear' that the suit is based upon evidence or information in possession of the United States, etc., the court shall be without jurisdiction to proceed with it. This clearly means, not that plaintiff must in his pleadings or otherwise negative knowledge on the part of government agents, but that the court shall lose jurisdiction whenever that fact is established in the case.

In the second place, we do not think that knowledge on the part of a government official who is implicated in the fraud precludes suit by the informer. The whole history of the provision shows that its purpose was, not to bar bona fide suits by informers merely because corrupt officials of the government might have participated in the fraud or refused to prosecute it, but to prevent the bringing of parasitical actions by those who sought to profit from governmental investigations or prosecutions by using the evidence which these had developed, as occurred in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L.Ed. 443, the decision in which led directly to the legislation of which the provision here is a part." (emphasis added).

This is consistent with the long recognized principle that an agent's knowledge will not be imputed to his principal when the interests are adverse. See and compare: *Schoenbaum v. Firstbrook*, 405 F.2d 200, 211-212 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); *Southern Farm Bureau Casualty Insurance Co. v. Allen*, 388 F.2d 126 (5th Cir. 1967); *Dillon v. Berg*, 326 F. Supp. 1214 at 1224

(D. Del. 1971) *aff'd* 453 F.2d 876 (3d Cir. 1971); *Continental Bank & Trust Co. of Salt Lake City v. Garfinkle*, 292 F. Supp. 709 (S.D.N.Y. 1968); *Laub v. Genway Corporation*, 60 F.R.D. 462 (S.D.N.Y. 1973).

Further, in the vast reaches of the Washington bureaucracy, knowledge in the possession of one agency will not even be imputed to another. See *Bateson-Stolte, Inc. v. United States*, 305 F.2d 386 at 388, 158 Ct. of Claims 455 (Ct. of Claims 1962); *Henry v. United States*, 250 F. Supp. 526, 527 (N.D. Miss. 1965).

POINT V

The Justice Department Did Not Act Timely or With Diligence. There Is No Authority for Its Special Appearance on the Sixty-third Day After the Filing of the Action. Maintenance of This Action Should Be Permitted.

Relator's presentation of the facts and circumstances of this case required the Justice Department to act expeditiously. It claims to have first been alerted to the subject of this action by Congressman Aspin's letter of August 19, 1976. That letter was answered some forty-eight days later on October 7, 1976 (A522). By then the Justice Department had Relator's complaint and the ten documents. The Justice Department waited until December 2nd to serve Relator with its special appearance.

The False Claims Act requires the Justice Department to act within sixty days and with diligence. 31 U.S.C. §§232(C) and 233.* See also *United States v. Bornstein*, *supra* at page 315, n.11. Here it did neither.

* " * * * The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such

There is absolutely no authority under the Federal Rules of Civil Procedure or in the express provisions of the False Claims Act for a special appearance. *Grammenos v. Lemos*, 457 F.2d 1067 (2d Cir. 1972); 5 Wright and Miller, *Federal Practice and Procedure*, Civil §1344 (1969).

The Government has only two options under the express statutory language of the False Claims Act: (i) to permit the Relator to prosecute or (ii) to take over the action and to prosecute it diligently, 31 U.S.C. §232(C).

The defendants' two-page notice of motion served on December 6th relied on the Government's papers and was not even considered by the Court below. It should not be considered to excuse the Government's untimeliness and its failure to elect one of the only two options expressly provided the Government in the Act.

POINT VI

The Damages to the United States and Its Taxpayers Are Already Substantial. If Jurisdiction Is Sustained, the Documentary Evidence Will Establish That Defendants Kulukundis, Chen and Burmah, Aided and Abetted by the Other Defendants, Engaged in a Subterfuge to Defraud the Government and to Cause False Applications for Financing to Be Filed With MarAd.

The essence of the alleged fraud is that deliberately false applications were submitted to MarAd, claiming that the applicants were United States citizens, when in fact they were not, inasmuch as they were controlled by Burmah (A509-516; 545; 553-571).

The Government has already paid out \$79 million in connection with financing for the Cryogenic Companies. See

suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States." 31 U.S.C. § 232(C).

Paragraph 18 of the Nemirow Affidavit (A270). The construction cost for the three vessels which are nearing completion is \$280 million. Approximately \$150 million of the foregoing is guaranteed under Title XI Financing. The United States has guaranteed the prompt payment in full of interest and unpaid principal in the event of default in payment of funds borrowed to finance the construction. [Nemirow Affidavit ¶¶ 6 and 18] (A265; 270).

If Burmah fails to meet the interest payments and other carrying charges of the loans as well as the principal thereof when they become due, the United States Government will in all likelihood have to make those payments. This is by no means a remote possibility, as Burmah today is not financially a healthy company. Its financial plight was referred to in a footnote on the first page of Exhibit 14 of the Government's moving papers:

"Burmah Oil has been much in the news lately. The British Government was required to step in and guarantee a large part of Burmah's dollar obligations in light of Burmah's large losses during the past year in its tanker operations. *See* N.Y. Times (city ed.), Jan. 3, 1975, p. 37, c.1; the Wall Street Journal (Eastern ed.), Jan. 3, 1975, p. 6, c.1." (A481).

Since that time Burmah has incurred increasing losses, reporting for the six months ended June 30, 1976 a loss after taxes of approximately thirteen and one-half million pounds or approximately \$24 million. [See Exhibit 11 to Dannenberg Affidavit] (A547-550).

In the case of the Cherokee I-IV Companies the affidavits of United States Citizenship were executed by defendant-appellee John C. Bullitt ("Bullitt"), a partner in a Manhattan law firm. Those affidavits, sworn to August 8, 1973, in part provided:

"I, JOHN C. BULLITT, of R.D. #1, Princeton, New Jersey, being duly sworn, depose and say:

1. That I am the President of each of Cherokee I Shipping Corp., Cherokee II Shipping Corp., Cherokee III Shipping Corp. and Cherokee IV Shipping Corp., each a corporation organized and existing under the laws of the State of Delaware (hereinafter collectively called the "Corporations"), * * *

2. That I am authorized by and in behalf of each of the Corporations to execute and deliver this Affidavit of U.S. Citizenship;

* * * * *

4. That the information as to stock ownership, upon which each of the Corporation relies to establish that the required percentage of its stock ownership is vested in citizens of the United States, is as follows:

<i>Name of Stockholder</i>	<i>Number of Shares Owned</i>	<i>Percentage of Shares Owned</i>
John C. Bullitt	500	100%

and that said individual stockholder is a citizen of the United States as aforesaid.

5. That the controlling interest in each of the Corporations, as established by the data hereinbefore set forth, is owned by citizens of the United States; that the title to a majority of the stock of each of the Corporations is vested in citizens of the United States free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; that such proportion of the voting power of said Corporation is vested in citizens of the United States; *that through no contract or understanding is it so arranged that the majority of the voting power of said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; and that, by no means whatsoever, is control of any of the Corporations*

conferred upon or permitted to be exercised by any person who is not a citizen of the United States; and

6. That affiant has carefully examined this affidavit and asserts that all of the statements and representations contained therein are true to the best of his knowledge, information and belief.

Dated: August 8, 1973

/s/ John C. Bullitt"

(emphasis added) (A537-539).

Mr. Bullitt also executed verifications to each of the applications certifying that the applicants were citizens of the United States within the meaning of Section 2 of the Shipping Act and certifying further

"that I have carefully examined the application of all documents submitted in connection therewith and, to the best of my knowledge, information and belief, the statements and representations contained in said application and the related documents are full, complete, accurate and true." (A541).

As to these Cherokee Companies, attorney Kurrus wrote to McMullen of Burmah on August 21, 1975, reporting on a telephone conversation he had that day with Mr. Bullitt. That memorandum in part reads:*

"I had a discussion today on the telephone with Mr. John C. Bullitt, . . . Mr. Bullitt had signed, as President each of the Cherokee I-IV Shipping Corporations, applications for Title XI construction loan and mortgage guarantees that were filed with MarAd on August 8, 1973. Mr. Bullitt was listed as the owner of all the outstanding stock (500 shares) of each com-

*This second Kurrus Memorandum dated August 21, 1975, is Item 3 to Schedule A to the Complaint and was not in possession of the Department of Justice, the S.E.C. or MarAd prior to September 30, 1975. (A50-54, 2761, 496-502). It had been in possession of the Brooks Committee (A494).

pany. He signed the affidavit of United States corporate citizenship. The other officers and directors of each of the applicants were also members of the law firm . . . who were at that time acting as counsel for Burmah Oil Tankers Limited (BOTL).

"I asked Mr. Bullitt why he had formed the Cherokee I-IV Shipping Companies, with himself as President and sole stockholder and why he had filed the Title XI applications with MarAd and signed the affidavits of corporate United States citizenship. He said that his law firm at that time represented BOTL and that he had accordingly taken each of these actions at the request of and as an accommodation to BOTL. He further explained that 'at the request of BOTL' meant 'at the request of Elias Kulukundis'.

"In response to my questions, Mr. Bullitt stated that he had no independent interest in any of the Cherokee companies and that he understood and BOTL understood that he was holding the stock in each of the companies for the benefit of Burmah. I asked him whether he recalled any understanding that may have existed between Mr. Kulukundis and Dr. C. Y. Chen at the time that the original Title XI applications of the Cherokee I-IV Companies were filed on August 8, 1973.

* * * * *

He said that *there was an understanding that Dr. Chen would form United States companies that would act as the bareboat charterers of the Cherokee vessels and that the financing and structure of the Pertamina/Cherokee venture would be a 'carbon copy of the Easco deal'.*

"I asked him why he had not mentioned the role of the Energy Transportation Corporation in the original applications and he stated that he could not recall specifically why he did not *but that he thought he had been instructed to leave them out by Mr. Kulukundis.*

"He said that everyone involved in the Cherokee applications, including especially Messrs. Kulukundis and Chen, assumed that construction loan and leverage lease mortgage financing identical to that in the Easco deal would be put in place. There was no discussion of any alternative financing and, therefore, no thought or consideration was given to any role that Dr. Chen's companies or the Energy Transportation Corporation would have under any alternative financing plan.

"Mr. Bullitt explained that the financing plan involved the establishment of owner trusts which would be the United States citizen owner-lessors of the vessels. He also explained that the owner participants in these trusts were three separate dry trusts established by the 'lending banks' which would have no recourse against the banks. These dry trusts were to borrow the equity money involved for the construction and mortgage financing strictly on the basis of the guarantees of Burmah Oil Company Limited. In other words, these 'lending banks' would have no equity investment or risk in the deal-everything would be guaranteed by Burmah. This is precisely the way that the deal was structured with the Easco vessels.

"Mr. Bullitt stated that it was intended that the Cherokee construction contracts with General Dynamics and the rights under the MarAd applications would be transferred to the respective owner-lessors as soon as the financing had been put in place. It was contemplated that the owner-lessors would arrange for the construction financing on the basis of Burmah's guarantees, and that they could obtain the advantage of the tax deductions for interest on the construction loans. Again this was patterned after the Easco deal.

* * * * *

The facts as set forth by Mr. Bullitt create a situation which is much more serious than we had supposed. It

seems obvious that there was a misstatement of fact when Mr. Bullitt certified under oath the United States citizenship of the Cherokee I-IV Shipping Companies. Mr. Bullitt stated to me that Burmah had control of these companies, that he took his orders from BOTL and that he held the stock for the benefit of and as an accommodation to BOTL." (emphasis added) (A50-53).*

Thus, if in fact Burmah controlled directly or indirectly by contract, understanding, arrangement or any other means the applicants for C.D.S. Financing or for Title XI Financing, i.e. the Cryogenic Companies in connection with the Easco Transaction or the Cherokee Companies in connection with the Pertamina Transaction, it must follow that false claims have been submitted to the Government.

The significance of this was not lost on Mr. Blackwell of MarAd in his private correspondence of May 1, 1975 with one of the parties in connection with the applications of the Cherokee Companies when he wrote:

"I have read with concern the recent exchange of correspondence between the Energy/Cherokee interests and Burmah Oil Incorporated. Many of the facts set forth in these letters do not comport with the understanding of the project held by the Maritime Administration nor in our view with the representations made to us when we considered and issued the commitment to guarantee obligations incurred in the financing of the five LNG vessels being constructed at General Dynamics. If the letters of April 18 and April 28 from Burmah are accurate reflections of the status of the parties, substantial doubt is created concerning compliance with the citizenship requirements of section 2 of the Shipping Act, 1916, as amended.

* BOTL as referred to, is Burmah Oil Tankers Limited. As the memorandum indicates, the Pertamina Transaction was initially structured similarly to the earlier Easco Transaction.

Since Title XI guarantees are available only to persons qualified as United States citizens pursuant to section 2 who are in no way subject to control by non-citizen interests, it will be necessary to immediately define with some degree of specificity the roles of the participants in this transaction." (A480).

Blackwell did not really want all the facts to come to light as is indicated by his exchange with Burmah's attorney on May 8th, reflected on page 3 of the Kurrus Memorandum.

"I (Kurrus) explained that the real problem *vis-à-vis* the Energy people arose because of the special legal problems concerning the Title XI financing and that everyone recognized that the structure that MarAd had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A. J. Chandris etc.) was based on a fiction. *He (Blackwell) said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.*

I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible." (Emphasis added—parenthetical material ours). (A49).

Any doubt as to control by Burmah of the Cryogenic and Cherokee Companies as well as over the entire transactions is dispelled by the document entitled

"A Proposal to Japan Line, Ltd. for the Formation of a Transportation Joint Venture of Liquified Natural Gas",

authored by the defendant Burmah Oil Tankers Limited, a Bermuda corporation and wholly owned subsidiary of Burmah with offices at 1185 Avenue of the Americas, New York, New York 10036 and dated May 29, 1975. (A553-574).*

That document discusses the Pertamina and Easco transactions as follows:

"In addition to the five LNG carriers which are the principal subject of this suggested joint venture, Burmah also has under construction three other LNG carriers also at General Dynamics, making a total of eight ships in all. At present, the first, second and fourth ships to be delivered are designated as the "Easco" ships and the remaining five ships considered in this proposal are designated as the "Cherokee" ships. In the case of the Easco ships, financing has been completely arranged and the first of the Easco vessels is scheduled for delivery in November, 1976. Because the financing has been arranged with Title XI and Construction Differential Subsidy ("CDS") has been approved for the Easco ships, they will be operated under U.S. flag conditions.

"The Pertamina Transportation Agreement calls for eight ships and in the interest of giving Japan Line all of the basic information which they may require at this time, the statistics and financial results in this pro-

* This document was not submitted by Relator with the Complaint and Schedule A (A551-552).

posal will assume the use of eight ships with operating costs based on U.S. flag operations. While it would be possible to consider all eight ships in the joint venture, the possible requirement of repaying the CDS and arranging new financing would probably eliminate the Easco ships from the suggested joint venture. On the other hand, three additional LNG carriers would have to be included in the overall transportation system in order to satisfy the requirements of the Pertamina contract and these three additional LNG carriers could either be constructed at Quincy or at a Japanese shipyard or even possibly secured on the world market on a resale basis.

"The transactions involved in establishing the possible joint venture and the servicing of the long-term transportation agreements are of necessity complex and subject to negotiations between Japan Line and Burmah Tankers. Therefore, it is the intent of this proposal to present a brief outline of the background and the main elements involved to serve as a basis for further discussions." (A555-556).

The proposal discusses the anticipated profitability of the transactions and the background. Burmah's control is substantiated in those sections of the proposal relating to Background, as follows:

"III BACKGROUND

All eight vessels are being constructed by the General Dynamics Shipbuilding Division at Quincy Massachusetts. These vessels are now estimated for delivery from November 1976 to April 1979 at three to six month intervals.

The three Easco vessels were originally dedicated to the transportation of LNG from Algeria to the East Coast of the United States for a joint venture of two utilities ("Eascogas"). However, in July 1974 the Al-

gerians rescinded the LNG sales contract underlying the transportation agreement. As a result of this action and the subsequent delay in formation of a new sales contract, Burmah has notified Easogas that these ships could no longer be exclusively reserved for the Easogas project. Instead, it is contemplated that these ships will be considered to fulfill the requirements of the transportation agreement which Burmah signed with Pertamina for the transportation of Indonesian gas to Japan. However, this is not definite and the possibility of a new transportation agreement with Easco is also being considered.

In addition to these vessels, Burmah Tankers has also caused an additional five identical ships to be contracted at General Dynamics to service the Pertamina Transportation Agreement, the basic terms and conditions of which are summarized in Section V of this proposal. This agreement provided a major advantage in that the Indonesian liquefaction plant is scheduled for completion in early 1977. In most LNG transportation projects, it is not unusual for the first vessel to be delivered and proceed directly into layup to await the completion of the liquefaction plant.

"The Easco ships are being constructed with Construction Differential Subsidies of \$21,252,000 per ship and Title XI guaranteed financing provided by the U.S. Government. The remaining five have a preliminary commitment for U.S. Government Title XI construction financing and Construction Differential Subsidy is not contemplated. The U.S. Government provides these shipbuilding incentives with the requirement that the vessels be operated under U.S. registry with at least 51% U.S. ownership. As noted previously, registration under non-U.S. flag of the Easco ships would possibly require repayment of the construction subsidies. Even with repayment of subsidy the construction costs are less than \$95,000,000

and could not be duplicated anywhere else in the world.

"As noted the construction and long-term financing for the Easco vessels has been arranged. The ownership of these three vessels vests in a financial group led by the First National City Bank and includes The First National Bank of Chicago and General American Transportation Corporation (GATX), a major transportation leasing company. In the case of the second series of five ships, neither the construction or long-term financing arrangements are yet complete and, at the present time, Burmah Oil is providing the funds for the construction of these five ships. Steps will soon be taken to arrange both the construction and long-term financing. Therefore, if non-U.S. flag operation is to be considered, a decision must be made before U.S. financing is finalized.

"While the details of ownership and operation are complex, all eight ships are, in one form or another, guaranteed by Burmah. Since Burmah is to be the long-term charterer of the ships, and it has guarantee construction financing and the time charter payments, that supports the long-term financing. Clarification of the various interrelationships can be provided. At this time, it is sufficient to state that the purpose of the different corporations is to provide got [sic] U.S. construction benefiting for Title XI financing. (A562-563).

CONCLUSION

Relator's *qui tam* complaint, Schedule A, and the ten documents presented important evidence, assembled scattered pieces of information, and shed new light on false applications and improper claims for financing under the Merchant Marine Act of 1936, involving millions of taxpayer dollars. Concededly the Government, prior to September 30, 1976, did not have all the evidence, all the information and the documents furnished by Relator. No arm of the executive branch had undertaken any meaningful action. No complaints had been filed. No indictments brought. Although the applications on behalf of Burmah were first filed with MarAd in 1972 and 1973, and although MarAd asserts that it was put on notice in 1975 of the possibility that false claims were filed with it, no proceeding or investigation had been commenced by it.

In addition to the Kurrus Memorandum and its evidence of (i) the complicity of MarAd and (ii) that agency's inclination to cover up the fraud, Relator assembled for the Government all the facts and legal issues in an original complaint and assembled and furnished key documentation. After many months of apparent inaction, the filing of this complaint finally generated a response from the Department of Justice—a negative one in the form of a motion to dismiss for which there is no statutory authority.

The factual and legal issues presented by Relator's complaint should be aired and decided objectively by the Judicial Branch of the Government, in accordance with the purposes and provisions of the False Claims Act.

The Government did not establish that this suit "was based upon evidence or information in possession of the United States, or any agency, officer or employee thereof".

Therefore the statute gives Relator jurisdiction to prosecute this action.

The judgment below should be vacated and the order of dismissal reversed.

Dated: New York, New York
March 31, 1977

Respectfully submitted,

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The False Claims Act
31 U.S.C. §§ 231, *et seq.*

§ 231. Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

§ 232. Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

The False Claims Act

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth the reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided, That* if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no juris-

The False Claims Act

diction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

* * * * *

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable

The False Claims Act

expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

§ 233. Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of \$2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

§ 234. Repealed. Dec. 23, 1943, c. 377, § 2, 57 Stat. 609

§ 235. Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward.

Revised Statutes, Sections 3490 and 5438

§ 3490. "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

§ 5438. "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of

Revised Statutes, Sections 3490 and 5438

such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars." *

* See *United States v. Bornstein*, 423 U.S. 303, at 305-307 n.1, where the Supreme Court in part states:

"Section 5438 was repealed in 1909. Act. of Mar. 4, 1909, c. 321, § 341, 35 Stat. 1153. It has continued vitality only insofar as it specifies the acts giving rise to civil liability under § 3490. See *United States v. Neifert-White Co.*, *supra*. The criminal prohibitions were subsequently altered and codified in 18 U.S.C. §§ 287 and 1001."

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

KENNETH KAUFSTINE, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 780 CONCOURSE VILLAGE WEST
BRONX, N.Y.

That on the 31st day of MARCH, 1977,
deponent personally served the within BRIEF OF APPELLANT DOROTHY
S. GREENBERG

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

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Limited, Burmah Oil Incorporated, Burmah Oil Tankers Limited,
Bethel Marine, Inc., Southhold Marine, Inc., Vermont Marine,
Inc., Burmah Gas Transportation Limited.
One Battery Park Plaza
New York, N. Y. 10003

HUGHES, HUBBARD & REED
Attorneys for Defendant-Appellee K. Kaufstine
General American Transportation Corp.
One Wall Street, New York, N. Y. 10005

Sworn to before me this

31st day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930303
Qualified in Queens County 1979
Commission Expires March 30, 1980

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

KENNETH KENNEDY, being duly sworn,
deposes and says that deponent is not a party to the action
is over 18 years of age and resides at 1171 STERLING PLACE
BROOKLYN, N.Y.

That on the 31st day of MARCH, 1977,
deponent personally served the within BRIEF OF APPELLANT DOROTHY
S. GREENBERG

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ROBERT B. FISKE, JR.
U.S. Attorney for the Southern District of N.Y.
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Attorney for Defendant-Appellee Elias J. Kulukundis
One World Trade Center
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New York, N. Y. 10048

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
Attorney for Defendant-Appellee John C. Bullit
120 Broadway
New York, N. Y. 10005

Kenneth E. Kennedy

Sworn to before me this

31st day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JOSH KATZMAN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 109 CHRISTIE ST
NEW YORK, N.Y.

That on the 31st day of MARCH, 1977,
deponent personally served the within BRIEF OF APPELLANT DOROTHY
S. GREENBERG

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendants-Appellees Summit Marine Operations, Inc.,
Summit I Inc., Summit II, Inc., Summit III, Inc., Cherokee I
Shipping Corporation, Cherokee II Shipping Corporation, Cherokee
III Shipping Corporation, Cherokee IV Shipping Corporation, Cherokee V
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New York, N. Y. 10020

Josh Katzman

Sworn to before me this

31st day of MARCH, 1977.

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

Counsel Press, 55 West 42nd Street, PE 6-8460